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In the

Supreme Court of the United States

October Term, A. D. 1941

No. 350

In the Matter of: WISCONSIN CO-OPERATIVE MILK POOL, Alleged Bankrupt.

WISCONSIN CO-OPERATIVE MILK POOL,
Petitioner,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin is reported in 35 F. Supp. 878. The opinion of the United States Circuit Court of Appeals for the Seventh Judicial Circuit is reported in 119 F.(2d) 999.

OBJECTIONS TO JURISDICTION

Respondents oppose the granting of the writ on the following grounds:

The question involved is not of importance so as to warrant the issuance of a writ of certiorari.

The determination of the question as to one co-operative will not be determinative of the question as to another, and the determination of the question as to a co-operative in one state will not be determinative as to a co-operative in another state.

The determination here involves a question of fact, to-wit: Are the activities of the bankrupt those of a business or commercial corporation?

The construction of the statute here involved (Section 4 (b) of the Bankruptcy Act, 11 U. S. C. A. §22 (b)) is clear.

Congress, in amending the Bankruptcy Act in 1938, without excepting co-operatives from involuntary bankruptcy, has approved the rule announced by the Circuit Court of Appeals.

The Circuit Courts of Appeals, where the question was presented, have reached a uniform conclusion. The decision of the Circuit Court of Appeals for the Seventh Circuit is in accord with local laws and decisions and with the decisions of this court.

STATEMENT OF THE CASE

Wisconsin Co-Operative Milk Pool (hereinafter referred to as the "Pool") was organized under Chapter 185 of the Wisconsin Statutes relating to the organization of co-operatives and to the business to be conducted by them.

The Pool's Articles of Incorporation give it the broadest of powers, including the buying, manufacturing and selling

of milk and by-products; the buying, selling and handling of real estate and personal property; the making of contracts of all kinds which may be convenient in the conduct of its "business"; and the borrowing of money (R. 8, 42, 43).

On June 12, 1936, the Pool took over the assets, business, good will and property of Milk Pool Products Co-Operative (R. 49).

The Pool sold cheese manufactured by local co-operatives. The marketing of cheese constituted the principal activity of the Pool (R. 34).

After December 1, 1939, the Pool received cheese from local co-operatives at a price of from ⅛c to ¼c a pound over the Plymouth market and sold the cheese at a premium of from ¾c to 1c a pound over the Plymouth market, retaining the profit. Prior to January 1, 1937, the Pool operated on substantially the same basis (R. 12-14, 19, 22, 25, 26, 29, 36, 38, 53, 54, 56).

Between January 1, 1937, and December 1, 1939, the Pool received a service charge as its compensation for selling cheese, based on the amount of the product handled (R. 12, 19, 29, 38).

The Pool maintained a warehouse where it graded, paraffined and packed cheese for shipment and sale (R. 37, 38).

The Pool sold milk and milk products in addition to cheese and received a service charge as its compensation therefor (R. 25).

The Pool purchased and sold to local co-operatives butter, processed cheese and supplies such as cheese salt, rennet, coloring, washing powder, cheese boxes, etc. (R. 11, 12, 17, 18, 33).

The Pool sold equipment to local co-operatives on conditional sales contracts providing for the payment of interest by the purchasers (R. 11, 12).

The Pool bought and paid for a large quantity of cheese, retaining the same in its warehouse for several months to speculate on a rise in the market and when the market failed to rise, was forced to sell the same at a loss. The Pool absorbed this loss (R. 29, 34).

The Pool owned, mortgaged and sold real estate (R. 10, 11, 30, 31, 35).

The Pool owned, mortgaged and sold personal property (R. 10, 11, 12).

The Pool loaned money and charged interest on such loans (R. 18, 19).

The Pool published a newspaper (R. 11).

The Pool engaged in trucking, for which it received compensation (R. 11, 32, 33, 67, 113, 117, 121).

The Pool maintained a reserve for bad debts; and absorbed bad debts for milk products that had been sold and for which collection could not be made (R. 16, 17, 57, 61).

The Pool borrowed a substantial sum of money and agreed to retire said loan on the basis of $2,500 per month. It later agreed to retire the same by paying over its net income (R. 18, 19, 29, 68).

ARGUMENT

I.

THE QUESTION INVOLVED IS NOT OF IMPORTANCE SO AS TO WARRANT ISSUANCE OF A WRIT OF CERTIORARI

The question as to whether co-operatives are amenable to bankruptcy is not of such importance as to warrant the issuance of a writ of certiorari.

The act of bankruptcy in this case was the making of an assignment for the benefit of creditors, designed to effect a

distribution of bankrupt's assets to its creditors. The bankruptcy law is designed to provide a uniform method of accomplishing such purpose.

When a corporation engages generally in commercial and business transactions and thereby becomes indebted to its creditors, there is no reason why the creditors should not have recourse to the bankruptcy court, irrespective of whether the corporation was organized under the laws relating to corporations generally or under laws relating to co-operatives.

Other corporations, such as public utilities, may also be affected with a peculiar public interest, but they are not thereby made non-amenable to bankruptcy.

While counsel argue that the Pool is a non-profit corporation, this is incorrect. The articles of the Pool provide that it shall operate on a non-profit basis, but what is meant by a non-profit basis is defined by Section 185.17 of the Wisconsin Statutes as follows:

> "Any association may operate upon a non-profit basis *by paying to patrons the whole amount of the net proceeds of the business.*" [Italics supplied.]

This statute recognizes that the co-operative will have profits, but permits the distribution of those profits to its patrons, most of whom are its members.

Throughout Chapter 185 of the Wisconsin Statutes for 1939 reference is made to the "business" of the corporation, "the net proceeds from the business," "transacting business" and its "right to do business." (§§ 185.01, 185.02, 185.08 (10), 185.16, 185.165, 185.19, 185.22 and 185.23, Wis. Stats.)

In Wisconsin a co-operative may issue stock and pay dividends upon its stock. (§§ 185.02 (3) and 185.08 (1), Wis. Stats.) Consequently, if counsel are correct, then some co-operatives organized under Wisconsin law would be ame-

nable to bankruptcy, and others would not, based upon the untenable distinction that one operates without capital stock, and the other operates with capital stock.

The determination as to the amenability to bankruptcy of co-operatives organized under Wisconsin law would not be determinative of the question as to co-operatives organized under the laws of other states. These laws may differ and be changed from time to time. Even as Wisconsin permits co-operatives to be organized without capital stock or with capital stock, so other states may have special provisions relating to co-operatives of such state which would present different facts. A determination of the question in this case would not be applicable to co-operatives of other states.

It is clear, we submit, that Wisconsin Co-Operative Milk Pool was a business and commercial corporation. The facts hereinbefore stated with respect to its business transactions so disclose. The Wisconsin Statutes relating to co-operatives clearly contemplate that co-operatives will enter into business transactions as their primary purpose. The trial court and the circuit court of appeals both dealt with it on that basis. Accordingly, the question as to whether the Pool is amenable to bankruptcy is a question of fact to be answered by a determination as to whether it engages as its prime purpose in business and commercial transactions. In every other case the same question of fact would inhere in the problem, namely, is the co-operative engaged in business and commercial transactions so as to bring it within the term "business and commercial corporations," as used in the bankruptcy law?

II.

THE CONSTRUCTION OF SECTION 4 OF THE BANKRUPTCY ACT IS CLEAR. CONGRESS DID NOT EXCEPT CO-OPERATIVES FROM INVOLUNTARY BANKRUPTCY IN ITS REVISION OF THE BANKRUPTCY ACT IN 1938, INDICATING AN INTENT THAT SUCH CORPORATION SHOULD BE SUBJECT TO INVOLUNTARY BANKRUPTCY

In 1938, when the Bankruptcy Act was revised by Congress, co-operatives were well known and recognized in the law. Furthermore, at that time the Circuit Court of Appeals for the Sixth Judicial Circuit in *Schuster v. Ohio Farmers' Co-op. Milk Ass'n.*, 61 F. (2nd) 337 (1932), had held that co-operatives of this character were subject to involuntary bankruptcy and *had referred to the failure of Congress to expressly exclude co-operatives from the operation of the Bankruptcy Act.* If Congress intended that co-operatives should be exempted from the operation of Section 4, it would have expressly exempted them at the time of the revision of the law in 1938. Instead, it reenacted the existing law without excepting co-operatives from involuntary bankruptcy. *Benitez v. Bank of Nova Scotia,* — U. S. —, 61 S. Ct. 953, 955 (May, 1941).

In 1932, by amendment to Section 4, building and loan associations were exempted from involuntary bankruptcy.

Furthermore, where Congress has intended co-operatives to be treated differently than other corporations, it has *specifically and expressly* exempted them from amenability in the following cases:

Co-operative telephone companies and agricultural co-operatives are exempted from corporate income taxes if the co-operative meets certain standards. 26 U.S.C.A. §101 (10), (12).

Stocks and bonds of certain agricultural co-operatives are exempt from stamp taxes. 26 U.S.C.A. §1808 (d).

Motor vehicles controlled and operated by co-operatives

as defined in 12 U.S.C.A. §1141 are exempt from certain provisions of the Interstate Commerce Act relating to motor carriers. 49 U.S.C.A. §303 (b) (5).

Securities issued by farmers' co-operative associations as defined in 26 U.S.C.A. §101 are exempt from the Securities Act of 1933. 15 U.S.C.A. §77c (5).

The anti-trust laws do not forbid existence or operation of agricultural or horticultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit. 15 U.S.C.A. §17.

Co-operatives are exempted from Social Security Act. 42 U.S.C.A. §409b (10) (B).

Co-operative banks are not investment companies within the Investment Company Act. 15 U.S.C.A. §80a-3 (3).

Banks for co-operatives are exempt from taxes other than property taxes. 12 U.S.C.A. §1138c.

Since co-operatives were not exempted in Section 4, it must be assumed that Congress intended that they should be subject to involuntary bankruptcy just as any other business or commercial corporation.

III.

THE CIRCUIT COURTS OF APPEALS, WHERE CASES HAVE BEEN PRESENTED, HAVE WITHOUT EXCEPTION AND WITHOUT DISSENT HELD CO-OPERATIVES ARE BUSINESS AND COMMERCIAL CORPORATIONS

The Circuit Court of Appeals for the Sixth Judicial Circuit in *Schuster v. Ohio Farmers' Co-op. Milk Ass'n.*, supra, and *Roumanian Workers Educational Ass'n. of America v. Poporich,* 108 F. (2d) 782 (1940), in which five different judges participated, and the Circuit Court of Appeals for the Seventh Judicial Circuit in the instant case, in which three different judges participated, have reached the uniform conclusion that a co-operative may be a business or commer-

cial corporation amenable to bankruptcy proceedings. The same result has been reached by the United States District Court for the Western District of New York in *Re South Shore Co-operative Ass'n.*, 4 F. Supp. 772 (1933).

There are no Circuit Court of Appeals cases or decisions of this court to the contrary. The only decisions to the contrary, except that of the United States District Court in this case, are two United States District Court cases decided prior to the *Schuster* case: *In re Dairy Marketing Ass'n. of Ft. Wayne, Inc.*, 8 F. (2d) 626 (D.C. Ind., 1925), and *In re Weeks Poultry Community, Inc.*, 51 F. (2d) 122 (D.C.S.D., Cal., 1931).

In the first of those cases, the court concluded that inasmuch as the co-operative was engaged in business for the benefit of its members rather than for itself, it was not a business corporation. On that basis, a stock corporation which provided that all of its earnings should be distributed to its stockholders and none should be retained by the stock corporation, would not be a business corporation because forsooth its business is for the benefit of someone else, to-wit, its members. But the Circuit Courts of Appeals for both the Sixth and Seventh Circuits clearly pointed out that it made no difference whether the profits were distributed to members and producers rather than to stockholders.

In the case of *In re Weeks Poultry Community, Inc.*, supra, the District Judge merely says that from his study of the case, he is of the opinion that the alleged bankrupt is not a moneyed, business or commercial corporation within the meaning of the Bankruptcy Act and cites *In re Dairy Marketing Ass'n. of Ft. Wayne, Inc.*, supra, as decisive of the question without discussion or further reasoning.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT IS IN ACCORD WITH THE APPLICABLE LAW OF WISCONSIN

Wisconsin Co-Operative Milk Pool was organized under Chapter 185 of Wisconsin Statutes. These statutes (analysis of which follows) recognize that co-operatives do and are intended to engage in business and that they do and may have profits from the operation of the business:

1. The statute provides that co-operative basis means, among other things, that "* * * the net proceeds from the business of such corporation are distributed to the patrons in proportion to the volume of business transacted by said patrons with the corporation; * * *" and "net proceeds" is defined to mean "the total proceeds minus expense of operation and cost of goods sold" (Sec. 185.01, Wis. Stats.).

It will be here noted that the statute contemplates that the corporation is conducting business, and the distinguishing feature of the co-operative basis is that the net proceeds are distributable to its patrons. The statute also refers to the business transacted with the corporation. From this it appears that business is a fundamental element of the transactions of a co-operative.

2. Co-operatives are organized in the same manner as non-co-operative associations (§185.02, Wis. Stats.).

3. The statutes recognize that stock in a co-operative association may be issued. In fact, only par value stock is authorized, but it also may issue preferred stock. Provision is made for the payment and retirement of preferred stock (§185.02, Wis. Stats.).

4. A co-operative may organize without capital stock, as the Pool was organized, but the Articles are required to state whether the property rights of members are equal or unequal,

and if unequal the rule by which their rights shall be determined shall be stated (§185.02, Wis. Stats.).

In this connection the Articles of the Pool specifically provide that the property rights of members shall be unequal and shall be based upon the ratio that the member's business with the co-operative bears to the entire business of the co-operative (R. 44).

5. A co-operative may dissolve the same as any other corporation (§185.07, Wis. Stats.).

6. The powers granted to a co-operative are of the broadest kind (§185.08 Wis. Stats.). They have all of the powers of any other corporation, but in addition may make contracts with members relative to the selling or buying of products or goods to their members.

7. The statute provides for drastic provisions, including liquidated damages, whereby a co-operative may compel its contract members to carry out its contracts (§185.08, Wis. Stats.).

8. The statute specifically refers to a co-operative "transacting business" in Wisconsin (§185.08 (10), Wis. Stats.).

9. Detailed provisions are made in the statute as to the apportionment of "the net proceeds of the business," the setting aside of a "reserve fund," the "computation of net proceeds," the setting aside of "the remaining net proceeds as an educational fund," the distribution of "all remaining net proceeds * * * in proportion to the volume of business conducted * * * with the association;" and in respect of associations organized without capital stock, the statute provides for the apportionment of the "net proceeds of the business" (§185.16, Wis. Stats.).

10. §185.165, Wis. Stats. deals with the apportionment and distribution of surpluses, reserves and other assets in the case of liquidation, indicating that a co-operative like other

corporations may build up surpluses and reserves and acquire assets which may be distributable to its members and patrons contrary to the provisions relating to eleemosynary corporations.

11. While it was recognized by §185.17, Wis. Stats. that co-operatives may operate as other corporations, that section also permits a co-operative to operate on a non-profit basis by paying to patrons the whole amount of the net proceeds of the business. This section recognizes that the corporation may engage in business; that it may have profits from its business; and that it may, if it so provides, retain none of those profits for itself. In this respect it would be no different than a stock corporation which would contain a provision in its Articles that all profits should be distributable to its stockholders.

12. The co-operative is required to give to the Secretary of State annually "a statement as to its business." Here again it is recognized that such a corporation is engaged in business. (Sec. 185.18, Wis. Stats.)

13. §185.19, Wis. Stats. makes provision with respect to any corporation being converted into a co-operative association "if such corporation is doing business upon a co-operative basis."

14. The general corporation law of Wisconsin is made to apply to all co-operatives, except where there is an express exemption (§185.20, Wis. Stats.). This indicates that it was not the intention of the Wisconsin statute to treat co-operatives any differently than any other corporation, except when express provision is made therefor.

15. That a co-operative does business is recognized by §185.22, but the distinguishing feature there is that it is conducting business on a co-operative basis. Furthermore, §185.22 (5) provides that the "right to do business" may be revoked.

16. That co-operatives may have income from its business is recognized by §185.23, Wis. Stats.

Briefly, then, the Wisconsin Statutes recognize that co-operatives do and are intended to engage in business, that they do and may have profits from the operation of the business. The distinguishing feature between co-operatives and other corporations, however, is the distribution or apportionment of such net profits. The statute authorizes co-operatives with stock or without stock. If a co-operative is a stock corporation, dividends may to a limited extent be paid on the stock, the remaining profits being distributable to its patrons.

The case of *Lambert v. Bank of Patch Grove,* 179 Wis. 359, 199 N. W. 555, cited by counsel at page 15 of their brief, was a garnishment proceeding and involved the question as to what was and was not property of the co-operative. This question can as well be determined in the bankruptcy court as in the state court, the rule for determination being the same in both places.

V.

THE DETERMINATION OF WHAT IS A BUSINESS OR COMMERCIAL CORPORATION IS NOT WITHIN THE CONTROL OF THE STATES

The question as to what corporations are amenable to bankruptcy is a matter for Congress to determine and is not left to the several states. If it were left to the various states, then a co-operative might be amenable to bankruptcy in one state and a similar corporation in another state would not be so amenable.

Counsel cites the case of *Re Union Guarantee & Mortgage Co.,* 75 F. (2d) 984 (C.C.A. 2nd, 1935) for the proposition that under Section 4 (b) of the Bankruptcy Act, the several states, although limited by the rule for uniform classification, may designate the types of corporations which are not

"moneyed, business or commercial corporations" and are therefore exempt from involuntary bankruptcy.

That case involved the specific exception of insurance corporations under Section 4 of the Bankruptcy Act. There the company filed a petition for reorganization under Section 77B of the Bankruptcy Act. The District Court dismissed the petition on the grounds that the debtor was an insurance company within the meaning of Section 4 of the Bankruptcy Act. The debtor was organized under the Insurance Law of the State of New York. The Circuit Court of Appeals affirmed the judgment of the trial court on the grounds that since the debtor was an insurance corporation under the state law, it could not reorganize under Section 77B.

That case is not authority for the proposition that a state may designate the types of corporations which are not "moneyed, business or commercial corporations" and therefore are exempt from involuntary bankruptcy.

That case emphasized that certain types of corporations were so affected with a public interest that it was not only necessary that they be supervised in their operations and business but also that they be liquidated under direct charge of state bodies when they ceased business. The corporation involved in that case was held to fall within the general classification of insurance companies exempted under the law.

But co-operatives in Wisconsin are not supervised as are the other excepted corporations such as banks, insurance companies, and building and loan associations. Their operations are as unrestricted and uncontrolled and unsupervised as other corporations generally. They have nothing in common with the class of corporations which are exempted because of the kind of their business which necessitates state supervision. When co-operatives dissolve, they do so without any more supervision than other corporations are sub-

ject to. Ordinary corporations upon dissolution also are permitted to avail themselves of court supervision in winding up their affairs (Sec. 181.02, Wis. Stats.) just as co-operatives may do.

Moreover, not every corporation organized under laws which provide supervision falls within the exception. In *In re Prudence Co., Inc.*, 79 F. (2d) 77 (C.C.A. 2nd, 1935; Cert. Den. 296 U. S. 646), the same court that decided the *Union Guarantee & Mortgage Co.* case subsequently held that a corporation organized under the New York Banking Law was neither a true banking nor insurance corporation within the meaning of Section 4 of the Bankruptcy Act and was therefore amenable to involuntary bankruptcy. The court said among other things:

> [79 F. (2d) p. 80]
>
> "* * * a declaration by a state that a certain class of corporations is not amenable to bankruptcy is brutum fulmen, unless the Bankruptcy Act itself excepts that class. * * *"

It is obvious that the court determined for itself whether the corporation was a banking corporation and did not deem it conclusive that the corporation was organized under the banking law of the State of New York.

The law is well established that "the provisions of the Bankruptcy Act creating exempt classes are strictly construed, and corporations claiming such exempt status must clearly come within the description used."

> *In re Bay Cities Guaranty Building-Loan Ass'n.*, 48 F. (2d) 623, (D.C., S.D., Calif., 1931).
>
> *In re Prudence Co., Inc.*, 10 F. Supp. 33, (D.C., E.D., N. Y., 1934), (Affirmed 79 F. (2d) 77; Cert. Den. 296 U. S. 646).

VI.

THE DECISION BY THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

Counsel argues that the decisions of the Sixth and Seventh Circuit Courts of Appeals, holding that co-operatives are subject to involuntary bankruptcy as business or commercial corporations, are probably in conflict with the implications of *Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Ass'n.*, 276 U. S. 71. In the *Liberty Warehouse Company* case, this court reviewed an action commenced in a state court of Kentucky by a tobacco co-operative against a warehouse company for violation of the state law regarding the sale of pledged tobacco. This court, after stating that co-operative marketing statutes promote the common interest, held that the legislature of Kentucky could treat marketing contracts between a co-operative and its members as a separate class, provide against interference therewith and to that extent limit the action of warehousemen. This court held or said nothing in that case that in any way conflicts with the decision of the Circuit Court of Appeals for the Seventh Judicial Circuit in this case.

We respectfully submit that the petition for a writ of certiorari should be denied.

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